Petition

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IN THE

Supreme Court of the United States

October Term, 1981

No.

STEVEN GOODSTEIN and MARTIN H. GOODSTEIN,
Petitioners,

vs.

UNITED STATES OF AMERICA, THE UNITED STATES POSTAL SERVICE and PATRICK A. PILLA, Realty Management and Acquisition Specialist, Sr. Real Estate and Building Department, UNITED STATES POSTAL SERVICE, NORTH-EAST REGION,

Respondents.

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

STEVEN GOODSTEIN and MARTIN H. GOODSTEIN

Petitioners,

-against-

UNITED STATES OF AMERICA, THE UNITED STATES POSTAL SERVICE and PATRICK A. PILLA, Realty Management and Acquisition Specialist, Sr. Real Estate and Building Department, UNITED STATES POSTAL SERVICE, NORTHEAST REGION

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

1A ISSUES

1. Where in a prior condemnation proceeding to take a property (land for construction) for a public purpose, Petitioner's were denied compensation for items called "business venture items," (costing $362,000) said here to be a required sacrifice for the public good, and undisclosed to Petitioners, during that litigation Respondents' public purpose had ceased; will Respondents be permitted to thereby reap a "windfall", in a private sale, (by selling that which they did not pay for) or will the property be deemed to be held in

"constructive trust" for Petitioners? Does the complaint herein properly plead the "constructive trust" doctrine involved in a prior decision of this Court?* Or since competitive bidding will require a bidder to include in his bid the value of those items, should Petitioners be given an appropriate credit with his bid and not be required to pay twice for these items?

2. Does the just compensation provision of the Fifth Amendment's requirement of fairness, sanction the required sacrifice of "business venture items" by Petitioners for the public good while permitting Respondents (when that public purpose fails to materialize) to sell that property for the windfall thereby created?

3. Is the discretion in Respondents by 40 U.S.C. 258f to return that property, to be deemed arbitrary and abused when not exercised at all, nor procedures taken to determine whether it should be exercised?

4. Where "business venture items" are not com-

*It is apparent to us in a review of the cases in this area of the law that on careful analysis of them that no Court has refused to grant the relief requested herein when there is a taking for a public purpose requiring a sacrifice of a part of the value of the property taken for the public good and that public good and that public purpose is aborted.

pensated for in a condemnation for a public purpose, though they still are otherwise property and protectable by the Courts, will the Courts protect them, where the public use ceases, and the government will be selling them by putting the "taken" property up for private sale?

5. Is "fraud" a proper ground for an action to restore the property herein?

6. As a procedural matter, should the complaint herein have been dismissed for failure to state a cause of action where:

a. the Court below indicated that it was relying on facts cited in Respondents' supporting affidavits and

b. without allowing Petitioners, discovery proceedings to acquire facts, if any, solely within Respondents possession that might be of assistance here?

1B PARTIES

The above caption contains the names of all parties herein.

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1d Official and Unofficial Reports of Opinions Below.

The District Court wrote no opinion.

The decisions of the Second Circuit have not yet been reported.

1e Grounds on Which Jurisdiction of This Court is Invoked

This courts construction of the meaning of the "just compensation" provision of the Fifth Amendment is applied daily in all courts throughout this land. In this period of governmental retraction, the events here will be of frequent occurrence. Yet no decision of this court gives specific guidance here.

Mitchell v. US 267 US 341 and Kimball Laundry Co. v. US 338 US, 1 both held that the Fifth Amendment does not require compensation for "business" or "good will", (though the reason for it shifted). The "harshness" of that rule also prompted Rutledge, J. to indicate that this Court was not looking to extend it's application United States v. Petty Motors 327 US 272.

Here it has been extended. The effective meaning of the decisions below, is that when the purpose for this sacrifice is aborted, and the government seeks to sell that, which it did not pay for, that the prior owner, to get his property back, must pay for it a second time.

As the passage of years permitted Kimball to make a sounder reappraisement of Mitchell, the further passage of time, and this approach to it from this different perspective, will, at the least, permit this Court to establish its' perimeters.

Early on, the Courts developed a "constructive trust" doctrine, where a sacrifice required by a taking produced an unjust enrichment. The Courts below were more impressed with a decision of this Court, where you found no sacrifice or unjust enrichment to have taken place, within that doctrine than they were with the fact that you utilized the doctrine, and that a sacrifice had taken place here within that doctrine. Your Reichelderfer decision should be clarified.

Congress provided for the return of properties in situations like this, by giving the Attorney General discretion so to do. The result below, is that the Attorney General's discretion here is held free from the requirements you put on other government agencies, not to be arbitrary, and to soundly and fairly exercise it. We could find no decisons of yours exempting the attorney General. If there is so important an exemption it is in need of formulation.

i The date of the judgment sought to be reviewed was August 13, 1981. The time of filing was the same, August 13, 1981.

ii The date of the order denying Petitioners' application for rehearing is October 5, 1981.

iii The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 20 U.S.C. §1243(1).

iv The District Court had jurisdiction by virture of 28 U.S.C. 1346, 1348, 1402, 39 U.S.C. 2103 and 40 U.S.C. 257 and 258a. The acts occured within the Southern District of New York; the subject of this action is real estate within said District. It arises out of U.S.A. v. Certain Property, etc., No. 62 Civ 2600. Jurisdiction is also founded on the Fifth Amendment.

If. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, United States Consittution:

"...nor be deprived of life, liberty or property without due process of law;"

"...nor shall private property be taken for public use, without just compensation".

The provisions of the statutes involved is 40 U.S.C. 258F.

> §258f. Same; exclusion of certain property by stipulation of Attorney General. In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise".

1g. STATEMENT OF CASE

This is an action seeking such relief as may be just, including the return of the parcel of real property acquired in condemnation for a public purpose, said purpose requiring Petitioners' sacrifice of $362,000 of "business venture items", where in process said purpose ceased, and Respondents seek a windfall by sale by bid for private purposes. Alternate relief, among others, may take the form of a credit on Petitioners bid for those items which bidders would have to include in their bid, but which Petitioners had already paid for.

The District Court, Judge Mary Lowe, on argument, granted Respondents' motion to dismiss the complaint, with prejudice, before requested discovery could be had. No formal opinion was filed, though the transcript may indicate the Court's reasoning. [Judge Lowe had filed an opinion, dismissing the complaint, brought on entirely different grounds, by another

in Merjanian v. U.S. N.O.R] A three judge panel of the second circuit affirmed and subsequently refused our motion for rehearing with a suggestion for a rehearing in banc.

FACTS

In April 1962 Plaintiffs-Appellants-Petitioners Goodsteins (hereinafter "Petitioners") contracted for and received title to a parcel of real estate at the southwest corner of Third Avenue and east 32nd Street, Manhattan, New York fronting on the former, 104 feet 2 inches, and on the latter, 125 feet. It consisted of eight city lots with tenements and small buildings on it. They proceeded to contract with statutory residental tenants to relocate (paying, pursuant to city law, their moving expenses etc.), purchased commercial leases, having remaining terms, and demolished the structures. They hired architects, engineers, lawyers, etc. to file and secure building department approval of plans for a twenty-plus story-apartment house. After the permit was issued, they proceeded to demolish the structures, contracted with, among others, suppliers, utilities, etc., filed for and secured F.H.A. approval of mortgage insurance and made other expenditures entailing a total

investment of nearly a million dollars. It was at this time that Defendant-Appellees-Respondents, United States (hereinafter "Respondents") filed a lis pendens for a coming condemnation proceeding, freezing Petitioners' action for another year, or until on September 30th 1963, the government decided to file the declaration of taking, vesting title, by condemnation in the United States. The required "public purpose" stated in their papers was that the property was to be used as a "site for postal facilities".

This matter entitled United States v. Certain Property, etc., Steven Goodstein and Martin Goodstein (62 Civ. 2600) was assigned to District Judge Dimock and tried before him and three Commissioners, appealed to the Second Circuit, (374 F2d 138) remanded, tried before Commissioners again, remanded thereafter to the Commissioners again and thereafter confirmed, in the amount of $638,000. This litigation lasted until approximately 1972.

The controversy centered around the government's contention that the above referenced costs (those expenditures beyond the consideration stated in the deed) were "business venture items" not compensable in the

condemnation proceeding. Petitioners' contention was that the entire sum, called a "package deal" in the real estate market, when a parcel in this stage of development is sold, is the price for real estate and should be included. For the most part, the government was successful, the second circuit then holding (374 F 2d 138 at 41):

> "In our opinion, the Court properly excluded these 'business venture' or package deal' items".

[We must emphasize, that we do not in any way manner or form seek to question or re-litigate this holding, to go beyond it, around it or under it. Indeed our position here is that regardless of any other contrary decisions, this decision is the law of the case, in this case, and binding and final. Our point about this decision is that of the nearly one million dollar expenditure by Petitioners, $638,000 worth was held compensable and $362,000 non-compensable. This Court's latest legal rational for non-compensability of "business venture items" is that this is a sacrifice an owner must make for the public purpose and the public good. That is, that when property is taken, the public good so demands such sacrifice. And note, that at no point, have we or do we now, ask for or seek an increased

compensation of any kind. Quite the opposite, we offer to pay any sum fixed by a Court for the return of the property].

Unknown to Petitioners, throughout the years that this condemnation proceeding was in litigation was that at some point during it (and perhaps even initially) the need of this site for a post-office or other public purpose had ceased. Respondnets told this to no one and continued on with this condemnation, consuming much additional expense and time (all-non compensable to Petitioners). However, an affidavit attached to Respondents' motion to dismiss below by John Q. Sheehan of the Post Office (page 3, pp. 9 & 10) recites that on May 12th 1969 (which was prior to the second of the three trials before the Commissioners), they had stopped and cancelled the awarding of construcjtion contracts, and other actions which were in furtherance of their plans. Petitioners' would also have readily agreed to the suspension of the litigation, looking forward to a cancellation of Respondents' indebtedness to them and the simple return of this property.

At the hearing below, counsel for the post-office

argued that its position was that it owed a duty to make a profit for the post-office, which could be accomplished by a sale and not by returning the property.

At no time since the outset (1962) has one physical thing been done to the taken property by Respondents.

Sometime in the middle or the end of 1980 Respondents offered the subject property for sale by bid to private persons for private use. Petitoners as soon as they could after they learned of this, brought this action.

Petitioners' complaint alleges at least three distinct causes of action, which are discussed hereafter. Left open for fuller development, if warranted, after pre-trial discovery proceedings has been had, were those facts involving fraud, misconduct, etc. required to be alleged in specificity, and yet still peculiarly within the possession of Respondents. In seeking review of the non exercise of the discretion reposed in the Attorney General by Congress, an inquiry into the actual reasons he had at the time will also be sought after. Accordingly, the first stage of that process was initiated

by serving a "Request for Production of Documents".

No sooner had we served this, than Respondents served Petitioners with a motion to dismiss, which was accompanied by numerous affidavits, which gives rise to the sixth point we make herein.

On the hearing, and without filing any formal written decision, the Court dismissed, with prejudice(without leave to amend the pleadings or replead). Many observations, orally given, in support of its ruling, had its source not within the four corners of the complaint, but in averments in supporting affidavits, that Petitioners had not, as yet, had the opportunity to explore in discovery proceedings.

POINT 1

THIS COURT'S PRIOR DECISION IN REICHELDERFER ET AL V. QUINN 287 U.S. 314 (1932) EMBRACES AND DOES NOT REJECT THE APPLICATION OF THE CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT DOCTRINE TO SITUATIONS SUCH AS ARE PRESENT HERE

The courts below were of the view that this court's decision in Reichelderfer et al v. Quinn 287 U.S. 314 (1932) rejected the grounds on which we bring this action. The exact opposite is true. They do not read this case correctly. It supports our position.

There the property owners adjacent to Rock Creek Park in the District of Columbia, had in the earlier taking proceeding been compelled to pay for the park, by an assessment for benefit, because their property

had been enhanced in value by putting the park there. Thereafter, when a piece of that park was used for building a firehouse, they claimed an unjust enrichment, and constructive trust* (as principally articulated theretofore in Story v. N. York Elevated Railroad Co. 90 N.Y. 123 (1882) and the cases hereafter discussed).

This court rejected the application of that doctrine to the case before it, holding that the assessment

*"Both express trusts and resulting trusts are based upon a manifestation of intention of the person who creates them. . . On the other hand, a constructive trust is imposed, not to effectuate intention, but to redress wrong or unjust enrichment. A constructive trust is remedial in character". RESTATEMENT OF TRUSTS P.6.

Where in the decisions cited herein, it refers to a "Trust" for the benefit of a condemnee for unjust enrichment reasons, we use the Restatement's name "constructive trust", though that name had apparently not been used for it until about 1919. Beatly v. Guggenheimer Expl. Co. 225 N.Y. 374 (1919). We do this to distinguish it from the "public trusts", for the benefit of the public at large.

"A person is unjustly enriched if the retention of the benefit would be unjust", Restate. Rest. §1a

"Where a person has the title to property which it is his equitable duty to convey to another on the ground that otherwise he would be unjustly enriched, a constructive trust arises in favor of the other. . . "Restate.Rest. §4(d).

for benefit there was not for a benefit of eternal duration but was for a limited time, and the owner had that benefit for a long while and received all that they were assessed for. It did not reject the doctrine itself as all of the cases cited were instances where the doctrine has been invoked.

While this court may not have had many occasions to be presented with that question, New York and other jurisdictions have. And in citing Brooklyn Park Commission v. Armstrong 45 N.Y. 234 (1871) and other New York cases, they were clearly adopting the decisions invoking the constructive trust doctrine as well as those defining its limits. People v. White 11 Barb. 26 at 32. Whitney v. New York 96 N.Y. 240 (1884).

Beistline v. City of San Diego 256 F2d 421, 423 and 424 (1943), (as did Reichelderfer supra,) did not renounce the constructive trust doctrine, though it was also cited for that by the Courts below. It expressly pointed out that the doctrine was not pleaded in the complaint:

> "This is not a case presenting the problem raised where land has been dedicated to a public use by conveyance subject to a condition or imposing a trust. A breach of such a condition or trust may be restrained".

The Court of Appeals decision below, misreading the Ninth Circuit, creates a conflict which should be resolved by this Court.

It is clear that the property in its state of development when it was originally taken, had a value in the market based upon its then condition, which if available for sale would bring a price at least equivalent to its cost. The 374 F2d Court however held that in a condemnation proceeding certain elements of that value were "business" and not compensable. Such a rule of value would not be applied absent a condemnation proceeding which is predicated upon a taking for a public purpose. Washburn v. National Wall Paper Co., 81 F 17. The Petitioners here were thus required to sacrifice $362,000 of the $1,000,000 otherwise value of the property because of a taking for a public purpose.

Petitioners were thus required to sacrifice in the name of public purpose and public good a very substantial part of what the property would otherwise have

brought to them in a sale in the real estate market. Respondents received the benefit of that sacrifice in the name of a public purpose for the public good.

But now there is no public purpose that this property is to be put to. Instead the Respondents are going into the real estate market to realize the gain by a sale which the Petitioners were prevented from realizing and will realize those elements of value which Petitioners were compelled to sacrifice in the name of public purpose or public good. In doing so, the government and/or Postal Service will be unjustly enriched. As such, the law recognizes a constructive trust on the property so that it is returned to Petitioners on terms that are just.

It is not claimed that there was an original undervaluation of the property which is being complained of, but that accepting the law of the case as the Circuit Court ruled it to be, at that time, the value for what was deemed its compensable elements was fair. It is the failure to recognize the excluded elements of value as compensable which led to the monetary sacrifice in the name of public purpose and public good and which

leads to the land being held in a constructive trust.

POINT II

THE ESTABLISHED DOCTRINE THAT THE "JUST COMPENSATION" PROVISION DOES NOT REQUIRE PAYMENT FOR "GOODWILL" OR "BUSINESS" IS SUPPORTED BY PRECEDENT, IF NOTHING ELSE.

BUT NO COURT, IN CONSTRUING THE FIFTH AMENDMENT, HAS GONE AS FAR AS THIS, (IN AN AREA THIS COURT HAS SAID IT WOULD NOT EXTEND) TO REQUIRE THE PETITIONERS HERE TO PAY A SECOND TIME FOR THIS SAME PROPERTY TO SECURE ITS RETURN AND TO GIVE TO THE GOVERNMENT A HUGE WINDFALL, AND UNJUST ENRICHMENT FOR PROPERTY IT NEVER PAID FOR.

We are not proceeding here because the government will not sell to us. Obviously they will. But only if we are the highest bidder. But for us to bid against others, we are forced to bid for things we al-

ready paid for, and were because of a judicial policy, not compensated for.

This is the result. Yet none of the decisions below address themselves to it.

We accept, as we must, the 374 F2d 138 decision, that Petitioners had to forego and* sacrifice compensation for "business venture items", as Mitchell v. United States 267 U.S. 341, 69 E. Ed. 644, 45 S. Ct. 293 held (i.e. "good will" or "business" cannot be compensated for.) The decisions below however are the first decisions resulting (and implicitly holding) that if the owner is to re-secure that property, that he must now pay twice for it.

They also permit the government to secure a windfall, through the sale of these "business venture items" as well as require the Petitioners to pay a second time for it.

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*or "a loss....as part of the burden of common citizenship". Kimball Laundry Co. v. U.S. 338 U.S. 1 at 5.

The very novelty of such a decision, makes it minimally a case of first impression, that should prompt this Court to review it.

Particularly is this true in this area of the law which Mr. Justice Rutledge's concurring opinion in United States v. Petty Motors 327 U.S. 372, at 381-382, said was one in which this Court had endeavored to keep confined and not extend, as you did in United States vs. General Motors 323 U.S. 373, and later in Kimball Laundry Co. v. U.S. 338 U.S. 1. These decisions returned their emphasis to the term "just" in the 5th Amendment's requirement of "just compensation", as have many others, i.e. United States v. Certain Property 306 F2d 439 (1962). And we seek to invoke that in arguing that a return of our property back when during the midst of the condemnation litigation they knew about the cessation of the public use, would have been the most perfect form of "just compensation" there could be.

There is a duty of fairness in the Fifth amendment's required of those who exercise it's powers of eminent domain, which was pronounced in the many

prior decisions of this and other Courts. That is, that the power of acquisition should go no further than to pursue the government's legitimate needs. So that when it became evident to it during the course of litigation to ascertain "just Compensation"* that there was no longer any public use for it and that the return of the property could be accomplished, this form of just compensation should have been offered to Petitioners then.

This is not the first time that a condemnor has found itself without the need for a property it had taken, but it is unique to find the condemnor unwilling to return the property, thus terminating the condemnation proceeding and its duty to pay for the property. This would have saved the time and expense of additional litigation for both condemnee and condemnor. The aborted discovery proceedings here were intended to shed some light on Respondents reasons for not

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*"(2) A transferee who would be under a duty of restitution if he had knowledge of pertinent facts, is under such duty if, at the time of the transfer, he suspected their existence". Restatement Rest. §10(2).

doing this then. A view of their reasons, however is given in the remarks of Counsel for the Post Office at the hearing of April 3rd where he said something to the effect that their department was under a duty to realize the largest profit that could be made.

It is our submission that the Fifth Amendment to the Constitution was not intended to be so used. It is a shield, not a sword. It is there to prevent government from being held-up for an unfair price. To protect it. To assure that government does not have to pay more for property than its fair value. Beyond that, a condemnor should not go. The power of eminent domain is not to acquire property so that it could then resell it for private use at a windfall profit, over the price the condemnor was priveleged to pay for it in a taking for a public purpose.

POINT III

THE FIFTH AMENDMENT'S REQUIREMENTS OF FAIRNESS, INHERENT IN

THE JUST COMPENSATION AND DUE PROCESS CLAUSES, REQUIRED THAT WHEN DURING THE COURSE OF THE EARLIER CONDEMNATION LITIGATION EVERYTHING ELSE WAS HELD IN ABEYANCE BECAUSE OF THE LACK OF PUBLIC USE, THAT LITIGATION OUGHT HAVE BEEN OFFERED TO ALSO BE HELD IN ABEYANCE, PENDING A RETURN OF THE PROPERTY. THE CONGRESSIONAL CONFERRING OF DISCRETION ON THE ATTORNEY GENERAL TO RETURN IT, WAS NOT SATISFIED BY HIS DOING NOTHING.

It is one thing where the condemnor has taken a property, devoted it to its public use and thereafter the public need ceases. It is quite another when in the midst of litigating the compensation, that it is revealed, or suspected, and the Respondents do not offer to hold the matter in abeyance, just as they were

holding everything else in abeyance, to ultimately return it.

It is our submission that there is a duty of fairness under the Fifth Amendment that is referred to in the decisions, and there is a duty the Attorney General owes as an officer of the Court. Both the authority and the duty to do this, we submit arises from such source. Additional authority to do so is also derived by statute, namely 40 U.S.C. 258F.

> §258f. Same; exclusion of certain property by stipulation of Attorney General. In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise?

We submit there to be a due process method under the Fifth Amendment for an official lodged with a discretion to exercise it. We think that in addition to their actions in suspending all other steps, that they should have advised the Court and Petitioners, offered to likewise suspend the proceeding, pending a final determination to return the property. Due process

should have permitted us the opportunity to be heard by him as to how their discretion should have been exercised.

By whomever exercised, a discretion is arbitrary and capricious

a) When the official having the discretion fails to exercise it at all. Obrenovic v. Pilliod, 282 F 2d 874 at 876 (1960); Dessulernos v. Savoretti, 356 U.S. 269 (1958).

b) And/or perhaps exercises it in the privacy of his own mind, or in some haphazard manner, Greater Boston Television Corp. v. F.C.C., 444 F 2d 841, 143 U.S. App. D.C. 383 cert. den. 403 U.S. 923 (1970).

c) And neither formulates nor express' any standard. Matlovich v. Secretary, 591 F 2d 852 at 855, 857 U.S. App. D.C. 243 (1978); United States ex rel Checkman v. Laird, 469 F 2d 773, 779-83, 787 (1972).

d) And fails to give some chain of reasoning or reasoned basis for his conclusion.
Bowman Transp., Inc. v. Arkansas Best Freight Systems, Inc., 95 S. Ct. 438, 449 U.S. 281, (1974).

e) Or he utilizes an unpermissible standard (gov-

ernmental profit) as argued above.

f) A court will not supply a reasoned basis for the Attorney General's action that he himself has not given, S.E.C. v. Chening Corp. U.S. 194, at 196 (1947).

These decisions which are basic rules for good thinking in any field, including law, would have provided the intellectual discipline, the outcome of which would clearly have dictated the return of Petitioners' property.

POINT IV

ON THE SAME UNJUST ENRICHMENT GROUNDS, IT HAS BEEN HELD THAT THE GOVERNMENT'S TITLE, PURPORTING TO BE A FEE INTEREST, WILL BE HELD TO BE ENCUMBERED BY SOME FORM OF EQUITABLE INTEREST IN THE GRANTEE, WHERE TO DO SO MAY PREVENT INJUSTICE.

In our complaint we plead the creation of what we have called a divided interest. That is, that a taking, in a situation like this is not quite complete enough as to take from Petitioners all of their property, there remaining in Petitioners a residual or equitable

title (i.e. to "business venture items") and that when the public purpose ceased, in a non-condemnation setting, this property became once again protectable by the Courts. There is no case, that we know of, that has ever held this in this specific situation, but there are many, that have held something like this in similar and comparable situations.

Some couple a constructive trust with some form of residual title kept in the beneficiary of the trust. In most, the unjust enrichment feature is emphasized. To illustrate:

Story v. Elevated R'y. Co., supra. not merely held that a constructive trust was created, as discussed heretofore, but it held that the fronting street in question, which was owned by the municipality in fee, at the time when Story's predecessor acquired title to the parcel fronting on it, had at the same time, engrafted on it, private street easements, (of light air & access) which were taken by constructing the elevated railroad within it.

In Kellogg v. Malin, 50 Mo. 496 (1872), there was a condemnation to locate a section of a railroad line

through a farm. The statute expressly authorized the railroad company to acquire a fee simple absolute and the railroad purported to acquire that interest. Nevertheless, the Court held that only an easement was acquired, by the railroad, because the award to the owner, offset by the benefits conferred by the railroad, might have been less than if it had been acquired to be used for another purpose.

In Abercrombie v. Simmons, 71 Kan. 538 (1905), a railroad corporation similarly expressly enpowered as above, took from the fee owner a warranty deed, in fee for the railroad strip, in lieu of condemnation. With otherwise similar facts and similar considerations and reasoning the Court still held that this deed, purporting to pass a fee, did not.

> "Whatever its name, the interest was taken for use as a right of way, it was limited to that use, and must revert when the use is abandoned".

To similar effect are the following: Bell v. Mattoon Water Works Co., 245 Ill. 542 (1910); Chateau vs. Mo. Pac. R'y Co., 122 Mo. 375, 225 W 458, 30 S.W. 299; Cincinnati, Indianapolis, St. Louis and Chicago R'y Co., v. Geisel, 119 Ind. 77, 21 N.E. 470; Cleveland,

Columbus, Cincinnati and Indianapolis R.W. Co. v. Coburn et al., 91 Ind. 557; Hill v. Western Vermont R.R. Co., et al., 32 Vt. 68, 74; Jones v. Van Bochore, 103 Mich. 98, 61 N.W. 342; New York Central & H.R.R.R. Co. v. Aldridge, 135 N.Y. 83, 32 N.E. So., 17 L.R.A. 516; Norton v. London and Northwestern Railway Co., L.R. 9 Ch. D.623; Ottumiva, Cedar Falls & St. Paul Ry v. McWilliams et al., 71 Iowa 164, 32 N.W. 315; People v. White; supra.; Pipe Line Co., v. D.L. & W.R.R. Co., 62 N.J. Law 254, 41 Atl. 759; Uhl v. Railroad Co., 51 W. Va. 106, 41 S.E. 340.

Lyman v. Gedney, 114 Ill. 388 402-404 (1885), is further instructive. It involved a public square within a town, and articulated the same divided title and constructive trust doctrines as the above listed holdings, but applied the doctrine of Laches to its assertion, evidencing that the retained interest is equitable.

An explanation is perhaps owing as to why we have selected for citation the lengthy formative decisions here and in our second point. Unfortunately, relatively recent decisions like Miller v. City of New York 15 N.Y. 2d 34 (1964) cite and adopt the holdings

of the decisions we cite, and state that a trust exists but do not fully elaborate. In order to more fully spell out the doctrine and its basis, we had to go back. But we know of no recent reversal or contradictions to the theory and principles there articulated.

POINT V

FRAUD IS ALSO A GROUND FOR A COURT TO DIRECT THE RETURN OF A PROPERTY TAKEN IN CONDEMNATION, AND ASIDE FROM THAT INHERENT IN THE FIRST AND FOURTH POINTS, IT IS PREMATURE TO FORECLOSE DEVELOPMENT OF THIS IN DISCOVERY PROCEEDINGS.

Beistline v. City of San Diego, 256 F 2d 421, at 423 and 424, cited by the decisions below, while rejecting a broad rule that a condemnor in all situations of cessation of public use must sell back to the prior owner, left the door open to the more limited cause of action involving unjust enrichment or fraud pleaded here. Of the former it said:

> "This is not a case presenting the problem raised where land has been dedicated to a public use by conveyance subject to a condition or imposing a trust. A breach of such a condition or trust may be restrained".

We have pleaded precisely what they said we could plead.

Fraud, must be pleaded in specificity it held, but absent discovery proceedings as to matters peculiarly within the knowledge of Respondents, we cannot say the facts so far demonstrated are as complete as they will be after discovery proceedings are conducted.

There, the Court gave Appellants leave to amend his pleadings to specifically allege fraud. Aside from the fact that this opportunity was not afforded here, Adams v. Chicago 39 Minn. 286 (1888), points out that the constructive trust created in Story supra., was based on the fact that there would be a fraud on an adjacent owner to allow the streets to be used as proposed. In short, fraud is inherent in such a cause of action for unjust enrichment or constructive trust.

POINT VI

IF RESPONDENTS MOTION TO DISMISS WAS MADE, AS IT STATES, UNDER RULE 8(c) AND 12(b)(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, A DEMURRER, THEN (DIFFERING FROM A MOTION FOR SUMMARY JUDGMENT UNDER RULE 56), SUPPORTING AFFIDAVITS CANNOT BE USED. IF IT WAS THE LATTER, THEN IT WAS PREMATURE, IN THAT IT EXCLUDED PETITIONERS FROM GAINING THE ASSISTANCE OF DISCOVERY PROCEEDINGS, AS TO MATTERS PECULIARLY WITH RESPONDENTS KNOWLEDGE

A demurrer admits the allegations of the complaint and denies that any claim to relief is stated or can be stated. This cannot be applicable here, since even the very cases relied upon by Respondents and the District Court (in an earlier decision) are stated therein to be exceptions to the general rule they therein state, holding Petitioners to have a cause of action.

This, before we had the opportunity to get at the facts (peculiarly within Respondents knowledge) through discovery proceedings. The Court erred in failing to apply Subdivision (f) of Rule 56 of F.R.C.P. Says Prof. Moore: (ibid).

> "Rule 56(f) bids the Court to exercise a spirit of liberality in granting time enough for the parties reasonably to develop the full facts upon the issues presented. §56.24; Slagel v. United States, infra. Cf. Surkin v. Charteris, (CA5th, 1952) 197 F2d 77, 17 FR Serv 56c.41, Case 9 (Set out in §56.15[6]).
>
> ****
>
> The practical matter of access to proof is a factor to be seriously considered on a motion for summary judgment, particularly where the crucial facts are largely within the knowledge or control of the moving party. §§56.15[5], 56.24;...."

SUMMARY

In the same way that the Courts have held that the just compensation provision required an owner to sell to the government at a "fair market value" and not exploit the governments need, a "just compensation" standard should protect the owner against the govern-

ment when the purpose of the taking is aborted and can be given back.

It is not just compensation when the government secures a windfall and unjust enrichment and an owner is made to pay twice for his own property.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Dated: December 22, 1981

Respectfully submitted,

SAMUEL GOLDSTEIN & SONS

By: ARTHUR D. GOLDSTEIN
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Appendix

81-1219

Office - Supreme Court, U.S.
FILED
DEC 30 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

No.

STEVEN GOODSTEIN and MARTIN H. GOODSTEIN,
Petitioners,

vs.

UNITED STATES OF AMERICA, THE UNITED STATES POSTAL SERVICE and PATRICK A. PILLA, Realty Management and Acquisition Specialist, Sr. Real Estate and Building Department, UNITED STATES POSTAL SERVICE, NORTH-EAST REGION,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN GOODSTEIN, et al.,
Plaintiffs,

—against— 81 CIV 137 (MJL)

UNITED STATES, et. al.,
Defendants.

MARY JOHNSON LOWE, D.J.

Defendants have moved to dismiss the complaint in the above-captioned action under Rules 8 (c) and 12 (b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Plaintiffs responded and opposed the motion. A hearing was held on April 3, 1981 during which each of the asserted causes of action was considered with respect to the defenses raised.

Based on the hearing and the pleadings received by the Court, and for the reasons stated in detail on the record of the hearing, the complaint is dismissed with prejudice.

It is So Ordered.

s/ Mary Johnson Lowe
United Sates District Judge

Dated: April 3, 1981
New York, New York

Filed
U.S. DISTRICT COURT
S.D. OF N.Y.
Apr 03 1981

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN GOODSTEIN, et al.,
Plaintiffs,

—against— 81 CIV 137 (MJL)

UNITED STATES, et. al.,
Defendants.

Defendants having moved to dismiss the complaint under Rules 8 (c) and 12 (b) (6), of the Fed. R. of Civ. P., and the said motion having come before the Honorable Mary Johnson Lowe, United States District Judge, and the Court thereafter on April 3, 1981, having handed down its order dismissing the complaint with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed with prejudice.

Dated: New York, N.Y.
April 13, 1981

s/ Raymond F. Burghardt
Clerk

Filed
U.S. DISTRICT COURT
S.D. OF N.Y.
Apr 13 1981

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirteenth day of August, one thousand nine hundred eighty-one.

PRESENT: HONORABLE THOMAS J. MESKILL, *Circuit Judge,*
HONORABLE AMALYA L. KEARSE, *Circuit Judge,*
HONORABLE ALBERT W. COFFRIN, *District Judge.**

STEVEN GOODSTEIN AND MARTIN H. GOODSTEIN,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, THE UNITED STATES POSTAL SERVICE and PATRIC A. PILLA, Realty Management and Acquisition Specialist, Sr. Real Estate And Building Department, United States Postal Service, Northeast Region,

Defendants-Appellees.

Steven and Martin Goodstein appeal from a judgment entered in the United States District Court for the Southern District of New York, Lowe, *J.*, dismissing their complaint pursuant to Fed. R. Civ. P. 12 (b) (6) for failure to state a claim upon which relief can be granted.

This cause came on to be heard on the transcript of record from the district court and was argued by counsel.

*Honorable Albert W. Coffrin, United States District Judge for the District of Vermont, sitting by designation.

In 1963, the United States, on behalf of the Post Office Department, exercised its powers of eminent domain to obtain title in fee simple absolute to Manhattan real estate acquired from appellants. Appellants fully litigated the legality of the acquisition and the sufficiency of their compensation in lengthy proceedings which were not concluded until October 31, 1973. *See United States* v. *Certain Property in the Borough of Manhattan*, 32 F.R.D. 48 (S.D.N.Y., 1962); *United States* v. *Certain Property in the Borough of Manhattan*, 374 F. 2d 138 (2d Cir., 1967); *United States* v. *Certain Property in the Borough of Manhattan*, 388 F. 2d 596 (2d Cir., 1967), *rev'd in part on rehearing in banc*, 388 F. 2d at 600 (1968).

In this action brought on January 12, 1981, appellants seek an injunction ordering the United States Postal Service to return said property to them pursuant to any terms that may be just. The gravamen of their claim to the property is that the Postal Service, which ostensibly acquired it as the site of a new mail processing facility, never built the facility and plans instead to sell the property at a large profit. None of appellants' several theories of recovery has merit. It is well established that:

> Because a sovereign body plans to acquire private property for a lawful purpose..., does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish a taking for private use, nor fraud, nor any fraudulent or false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking.

Beistline v. *City of San Diego*, 256 F. 2d 421, 424 (9th Cir.), *cert. denied, 358 U.S. 865 (1958); Reichelderfer* v. *Quinn*, 287 U.S. 315, 320 (1932); *Higginson* v. *United States*, 384 F. 2d 504, 507 (6th Cir., 1967), *cert. denied*, 390 U.S. 947 (1968).

In addition, appellants argue that discovery should be permitted so as to enable them to plead with greater particularity the fraud allegedly worked upon them by the United States. This contention is equally meritless. The complaint fails even to allege fraud as a cause of action, much less to plead with particularity the extrinsic fraud which could alone warrant relitigating issues adjudicated nearly a decade ago. *See Beistline* v. *City of San Diego, supra*, 256 F. 2d at 424.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgement of said district court be and it hereby is affirmed.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

s/ Amalya L. Kearse
Amalya L. Kearse, U.S.C.J.

s/ Albert W. Coffrin
Albert W. Coffrin, U.S.D.J.

Filed
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Aug 13 1981

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fifth day of October, one thousand nine hundred and eighty-one.

STEVEN GOODSTEIN AND MARTIN H. GOODSTEIN,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, THE UNITED STATES POSTAL SERVICE and PATRIC A. PILLA, Realty Management and Acquisition Specialist, Sr. Real Estate And Building Department, United States Postal Service, Northeast Region,

Defendants-Appellees.

DOCKET NO. 81-6112

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Steven Goodstein and Martin H. Goodstein,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro,

A. Daniel Fusaro,
Clerk
by Francis X. Gindhart
Chief Deputy Clerk

Filed
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Oct 05 1981

Opposition

Office - Supreme Court, U.S.
FILED
MAR 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1219

In the Supreme Court of the United States

OCTOBER TERM, 1981

STEVEN GOODSTEIN AND MARTIN H. GOODSTEIN,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the former owners of property condemned for a public purpose, who were awarded judicially determined just compensation, may compel the United States Postal Service to reconvey the property rather than sell it at a public auction.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1219

STEVEN GOODSTEIN AND MARTIN H. GOODSTEIN,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The order of the district court dismissing the complaint with prejudice (Pet. App. 1a) and the memorandum of the court of appeals (*id.* at 3a-5a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1981, and a petition for rehearing was denied on October 5, 1981 (Pet. App. 6a). The petition for a writ of certiorari was filed on December 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Steven and Martin Goodstein, are the former owners of a parcel of property which the United

States, on behalf of the Post Office Department,[1] acquired by condemnation in 1963. On July 26, 1962, the United States filed a complaint in condemnation to acquire the square city block bounded by Lexington and Third Avenues, and 31st and 32nd Streets in the Borough of Manhattan (C.A. App. 48a).[2] Petitioners, the owners of a tract in the block in question, filed an answer denying that the taking was for a public purpose. The district court, on motion of the government, struck that portion of the answer, ruling that the taking was supported by statutory authority and was for a public use. *United States* v. *Certain Property in the Borough of Manhattan*, 32 F.R.D. 48, 50 (S.D. N.Y. 1962).

On September 30, 1963, the United States filed a declaration of taking, pursuant to 40 U.S.C. 258a, describing the condemned estate as an "estate in fee simple to the said land together with the improvements thereon and appurtenances thereto." See *United States* v. *Certain Property in the Borough of Manhattan*, 374 F. 2d 138, 139 & n.1 (2d Cir. 1967); C.A. App. 54a. Estimated compensation was deposited in the registry of the district court, and, on October 3, 1963, that court issued an order confirming the transfer of title.

Trial on the issue of just compensation was to a commission under Fed. R. Civ. P. 71A(h); and it initially resulted in a judgment of $600,000 as just compensation for the Goodstein tract. Upon petitioners' appeal, the court of appeals reversed, holding that the district court had erroneously excluded evidence of petitioners' costs incurred in terminating

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[1]The Postal Reorganization Act, Pub. L. No. 91-375, Section 4, 84 Stat. 773-774, established the United States Postal Service as successor to the functions and assets of the Post Office Department.

[2]"C.A. App." refers to the joint appendix filed in this case in the court of appeals.

leases on the property. *United States* v. *Certain Property in the Borough of Manhattan, supra*, 374 F. 2d at 140, 142. The court of appeals, however, affirmed the district court's ruling that certain "business venture" or "package deal" expenses were not compensable. *Id.* at 140-141. Upon remand, petitioners were awarded just compensation in the amount of $638,000. The final judgment was entered on October 31, 1973, and no appeal was taken (Pet. 14; Pet. App. 4a).

2. When the United States acquired title to the parcel in question in 1963, the postal authorities had plans for a postal facility to be erected on the condemned block. Shortly before contracts were scheduled to be awarded in 1969, however, the project was suspended (C.A. App. 49a). First, the local congressional delegation desired a one-year suspension of the project to permit passage of new federal legislation providing for relocation assistance for tenants displaced from the project area. See Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* Furthermore, a new Postmaster General, Winton M. Blount, ordered a reevaluation of the need for new facilities in the New York region (C.A. App. 50a).

Consultants continued to recommend building the proposed facility on the condemned property in the first half of the 1970's (C.A. App. 50a-51a). In 1976, the Postal Service again reevaluated the need for the facility and ultimately concluded that because of changes in mail volume, mail handling technology, and organization, the proposed building would not be built (*id.* at 51a-52a). Under disposal regulations of the Postal Service, the property was offered to the General Services Administration for use by federal agencies, and then to the State of New York and to the City of New York. When none of these government entities expressed an interest in the property, it was put up for public sale (*id.* at 89a).

On January 12, 1981, shortly before bids were due in the public sale, petitioners filed this suit seeking the return of the condemned property (Pet. App. 4a). They contended that their title to the property had not been completely divested because of nonfulfillment of the public purpose of the condemnation, that they retained partial title to the property consisting of the uncompensated "business venture" items, and that the failure to compensate them for these items had resulted in the unjust enrichment of the United States. The district court ruled that the United States had acquired full legal title to the property through the declaration of taking and condemnation proceedings, and that the subsequent nonfulfillment of the public purpose did not invalidate the taking (Supp. C.A. App. 230a, 243a-244a, 260a-263a).[3]

On appeal, the court of appeals affirmed (Pet. App. 3a-5a). It held that the public need for a taking is judged solely by the conditions existing at the time of the taking, and that there was therefore no merit to petitioners' claims respecting the subsequent decision to sell the property at issue here (*id.* at 4a). The court also held that petitioners were not entitled to discovery to develop a claim of fraud because "[t]he complaint fails even to allege fraud as a cause of action, much less to plead with particularity the extrinsic fraud which could alone warrant relitigating issues adjudicated nearly a decade ago" (*id.* at 5a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any court of appeals. Review by this Court is therefore not warranted.

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[3]"Supp. C.A. App." refers to a supplemental joint appendix filed in this case in the court of appeals.

1. Petitioners' claim to partial or constructive title to the property is without merit since it constitutes a collateral attack upon the judgment in the condemnation proceedings, *United States* v. *Certain Property in the Borough of Manhattan*, 62 Civ. 2600 (S.D.N.Y. Oct. 31, 1973). While petitioners disclaim any intention of attacking the determinations made in that proceeding (Pet. 15), their assertion that they retain or should be granted title to the property because of inadequate compensation or unjust enrichment of the United States is precisely such an attack. In the condemnation proceeding, the estate taken was described as an "estate in fee simple * * *." (see page 2, *supra*), and the district court issued an order confirming passage of that title. The award of just compensation determined by the district court was for the taking of full title to the property. Petitioners cannot now claim partial title to the property on the basis of inadequate compensation without attacking either the order confirming transfer of full title or the award of just compensation.[4]

To be sure, petitioners may have suffered business losses as a result of the condemnation insofar as their development plans were frustrated and they had made certain expenditures not directly compensable in the condemnation proceeding. But any enhancement of the value of the property at the time of the taking by virtue of those business

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[4]As we understand the petition, petitioners no longer claim residual title to the property based upon nonfulfillment of the public purpose. As the court of appeals stated, the public purpose for a taking is established solely by conditions existing at the time of the taking (Pet. App. 4a). *Beistline* v. *City of San Diego*, 256 F. 2d 421, 424 (9th Cir.), cert. denied, 358 U.S. 865 (1958); *Higginson* v. *United States*, 384 F. 2d 504, 507 (6th Cir. 1967), cert. denied, 390 U.S. 947 (1968). At the time petitioners' property was condemned, the trial court made an explicit finding that the taking was for a public purpose. *United States* v. *Certain Property in the Borough of Manhattan*, 32 F.R.D. 48 (S.D. N.Y. 1962).

venture items would be reflected in the award of just compensation.[5] As this Court stated in *Mitchell* v. *United States*, 267 U.S. 341, 344-345 (1925) (citations omitted):

> The special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain. * * * The settled rules of law, however, preclude[] * * * considering in that determination consequential damages for losses to [the owner's] * * * business, or for its destruction.

It follows that there is no unjust enrichment of the United States in selling the property so enhanced. Neither is the government requiring the petitioners to purchase the "business venture" items twice by selling the property to the highest bidder. The United States is selling only what it condemned and paid for: title to the real property.

This case thus presents no occasion for reconsidering the long established rule that the legislature has plenary authority to change the use or to dispose of property originally acquired, in fee, for public use. *Reichelderfer* v. *Quinn*, 287 U.S. 315, 320, 323 (1932); *Beistline* v. *City of San Diego*, 256 F. 2d 421, 424 (9th Cir.), cert. denied, 358 U.S. 865 (1958).

2. Petitioners also contend that they were denied due process because the Attorney General failed to exercise

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[5]The compensable nature of the "business venture" items and their relationship to the condemnation proceedings were litigated extensively. See *United States* v. *Certain Property in the Borough of Manhattan, supra*, 374 F. 2d at 140. Even if there was error in the final resolution of the compensation issue, petitioners cannot now litigate the matter, long after the time provided in Fed. R. Civ. P. 60(b), has expired.

discretion pursuant to 40 U.S.C. 258f to exclude their former property from condemnation when questions concerning the construction of the project arose. The short answer to their contention is that, since formation of the United States Postal Service in 1971, the Attorney General has had no such discretionary authority over Postal Service property. A provision of the Postal Reorganization Act, 39 U.S.C. 410(b)(4)(A), authorizes the Attorney General to proceed on behalf of the Postal Service pursuant to specified provisions of the Declaration of Taking Act, 40 U.S.C. 258a *et seq.*, but it does not incorporate 40 U.S.C. 258f. In any event, even if Section 258f were applicable, it would not aid petitioners. This provision merely vests discretion in the Attorney General to exclude from a condemnation proceeding property otherwise covered by the declaration of taking. It creates no enforceable duty in this regard. See *United States* v. *10.47 Acres of Land*, 218 F. Supp. 730, 733 (D. N.H. 1962).

3. Finally, the courts below properly rejected petitioners' attempt to avoid dismissal of their action through a belated claim of fraud. Rule 9(b), Fed. R. Civ. P., requires that fraud be pleaded "with particularity." In the present case, petitioners failed to make any averments of fraud in their complaint. Instead, they sought discovery in order to find facts upon which such a charge could be based. One of the purposes of Rule 9(b), however, is to prevent the filing of complaints "as a pretext for discovery of unknown wrongs." *In re Commonwealth Oil/Tesoro Petroleum Corp. Securities Litigation*, 467 F. Supp. 227, 250 (W.D. Tex. 1979), quoting *Gross* v. *Diversified Mortgage Investors*, 431 F. Supp. 1080, 1087 (S.D. N.Y. 1977). Accord, *Segal* v. *Gordon*, 467 F. 2d 602, 607-608 (2d Cir. 1972). See generally, *Kadar Corp.* v. *Milbury*, 549 F. 2d 230, 233 n.2 (1st Cir. 1977). The court of appeals, therefore, properly rejected petitioners' vague claims of fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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